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Review of Proposed Hawaii Public Health
Regulations, Chapter 37 (for participa-
tion in NPDES)

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THRU: Chief, Proceedings Branch

Director, Enforcement Division

On September 13, 1973, we received the latest version
(August 16, 1973) for Hawaii's proposed Chapter 37, the regula-
tions drafted for participation in NPDES (enclosed).

The following are my comments on the latest draft of Chap-
ter 37:

1. There is still no specific provision in the statute or
regulations, as required by FWPCA §402(h), enabling
the State, where a permit for a treatment works is being violated,
to restrict or prohibit introductions to such system. Section
342-9 (emergency action) of Hawaii's enabling statute, Act 100,
is probably inadequate in that it only covers situations of "immi-
nent peril to the public health and safety." Section 342-12,
though empowering the Director to institute civil injunctive ac-
tion "to prevent any violation of this chapter or any rule or
regulation made thereunder," is vague on this issue and non-
specific. It does not specifically say violation or threatened
violation of a permit shall give rise to injunctive action. Nor
does it specifically empower a hookup or connection ban. As in-
timated in Regional Counsel's letter of September 28, 1973, this
matter could perhaps be handled via the Attorney General's certi-
fication required by FWPCA §402(b). If the certification were
to state, with appropriate references and citations, that: (a)
§342-12 may be utilized for permit violations; and (b) §342-12
empowers civil actions akin to those in §402(h), this would proba-
bly satisfy our requirements.

2. The definition of "wastes" contained in §1(b) of pro-
posed Chapter 37 implies that a substance or material
is a waste only if it causes state waters to be reduced in quali-
ty below standards. This is not as broad as the definition of
"waste" at §342-1(10) of Act 100. This narrowing of the defini-
tion bears significance because the General Prohibition of dis-
charge at §3 of the proposed regulations merely prohibits the
discharge of "wastes." Section 1(s) of the regulations adopts
the definition of "pollutant" from the FWPCA and §4 requires
that anyone discharging pollutants must file a permit application,
but the existence of the §3 language creates confusion. Further-
more, 40 CFR 124.10 requires that the prohibition of discharge be

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be equally as broad as that in FWPCA §301(a). The problem could be easily solved by adding the following (underlined) language to §3: "No person, including any public body, shall use any state waters for the disposal of waste or discharge of a pollutant . . . without first securing approval in writing from the Director."

3. I am still concerned regarding the existence of the variance provision at §342-7 of Act 100 which would allow "discharges in excess of applicable standards." There are no provisions for "variances," denominated as such, in the FWPCA or implementing regulations, and EPA policy does not allow them. (Note: This comment relates to variances from permit terms and conditions and should be clearly distinguished from the issue of variances from water quality standards or "zones of mixing"). Section 402 (b)(1)(C) of the FWPCA and 40 CFR 124.45(b) only provide that an NPDES permit may be modified for cause. Though Chapter 37 makes no provision for variances (it does contain a "modification" provision at §16), §342-7 remains on the statute books allowing variances. As Nelson Chang said in his letter of August 21, 1973, since Chapter 342 creates such a thing as a variance, it is doubtful the department can set it aside by regulations. There is a potential solution. Variances must be made on the forms and in the manner specified by the department as per §342-7. The department could provide either that: (a) applications for NPDES permit modification pursuant to §16 of Chapter 37 shall be deemed an application for a variance under §342-7 of Act 100; or (2) all applications for a variance from the terms and conditions of an NPDES permit shall be pursuant to §16 of Chapter 37 of the Public Health Regulations.

4. I note that the latest version of §1(s) of Chapter 37 no longer adopts the federal definition of "pollution" at FWPCA §502(19). Hawaii has its own definition at §1(a) of the regulations. As I read §1(a), water pollution only occurs if there is a discharge or alteration of the properties of the water as will either: (a) cause a nuisance; (b) endanger public health or welfare; or (3) violate a water quality standard or effluent limitation. Once again, the General Prohibition at §3 only prohibits discharges which will violate a permit or will "cause the waters of the state to become polluted." Thus, a discharge is not prohibited unless it is in violation of an issued permit or does one of the above enumerated things. This is narrower than the federal definition of pollution, I believe.

David S. Mowday

Enc.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Dr. Henri Minette, Asst. Director
for Environmental Health
Hawaii State Dept. of Health
P. O. Box 3378
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SEP 10 1973

Dear Dr. Minette:

During a telephone conversation on September 7, 1973 between myself and D. Tulang and J. Parnell both of your office, tentative agreement was reached on several measures intended to increase the participation of your Department in the NPDES program in Hawaii. These measures are described below.

1. State Permit Preparation - The State will begin at once to draft two or three NPDES permits using EPA standard conditions and permits already issued as guides. Permittees will be selected from the November (or later) issuance portion of the EPA six-month list previously furnished to the State. These draft permits will be reviewed with EPA who will propose them for issuance with any modifications that may be found necessary to comply with the guidelines and requirements of the Act. The State and EPA will repeat this process each month until Permit Program Approval is obtained by Hawaii.

2. Joint EPA-State Publications - All future Public Notices of Proposed Permit Issuance in Hawaii will be joint EPA-State notices. EPA will modify the Public Notice it currently uses to include notice that the State is considering a request for certification of the discharges (except Federal facilities which do not require certification) and solicit comments to the State for their consideration. This procedure is intended to satisfy the State's obligation under the Act to provide for public participation in the certification process.

3. Timely State Certification - The State will respond to EPA requests for certification promptly, i.e., within 14 days after the expiration of the public notice period.

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I would appreciate receiving your concurrence on the above tentative agreements. Please feel free to propose modifications or additions as you see fit. In order to permit implementation of item 2 above for the September Public Notices, we will need your concurrence by September 17, 1973.

Sincerely,

R. L. O'Connell, Director
Enforcement Division

cc: Dr. Richard E. Marland, Director
Office of Environmental Quality
Control
Governor's Executive Chambers
Honolulu HI

PIO, EPA

D. Tulang, Hawaii Dept. of Health

J. Parnell, Hawaii Dept. of Health

bc: RA
A/W
Office of Permit Programs, EPA HQ

RLO'Connell/wt
9/10/73
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